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September 8, 2003

Mr. Corbin Davis
Michigan Supreme Court
Michigan Hall of Justice
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2002-34
Proposed Amendment of Rules 7.204, 7.211, 7.212, and 7.216 of the Michigan Court Rules

Dear Mr. Davis:

I am writing to comment specifically on the proposed amendment to MCR 7.212(A)(1)(a)(iv). I have reviewed Progress Reports Nos. 1-3 on the Court of Appeals Delay Reduction Plan, as well as Judge Whitbeck's August 29, 2003, letter to this Court. Although I am not unalterably opposed to some adjustments in the time allowed for briefing, I believe that the stated case for shortening the briefing time limits and eliminating stipulated extensions is both historically ill-informed and practically ill-advised.

I start with the former shortcoming. I noted Judge Whitbeck's reference to the "culture of delay", with a specific exhortation to appellate lawyers to "take responsibility" for the effect that delay in briefing has on their clients.

I have been practicing civil appellate law exclusively for 25 years, and served on the State Bar's Appellate Court Administration Committee from 1987 to 1994. That period saw a gradual increase in the time that it took to obtain a decision in the Court of Appeals. Court-generated statistics concerning several years which were shown to the Committee by the Court's clerk showed **no increase in the time taken for what is now called "intake"**. The entirety of the increased delay was for the period after briefs were submitted.

Otherwise stated, the amount of time practitioners were taking to submit cases to the Court remained constant throughout the time culminating in the crisis stage to which delay eventually grew. Against that background, implicitly accusing the appellate bar of "responsibility" for a "culture of delay" is historically uninformed.

Beyond that, the argument made for eliminating stipulated extensions is based on a facially suspect premise and on a depressing lack of understanding of the dynamics of caseload problems in the private practice of appellate law.

The contention that the proposal will have any effect whatsoever is based entirely on the assumption that the "warehouse" portion of the Court's delay will be "eliminated or drastically reduced". In turn, that assumption is based on the funding increase which will allow the Court to hire an undisclosed number of prehearing attorneys who will, "**we believe**", eliminate or drastically reduce the warehouse time over an undisclosed period (which may be one, five, or ten years -- we are simply not told).

However, far more troublesome than its extremely tenuous assumption is the self-evident lack of familiarity with private civil appellate practice[1] which the proposal bespeaks. The caseload management problems in such a practice derive from several factors:

(1) The attorney has no control over when countdowns to deadlines commence. The filing of a transcript in an appellate case, the filing of a brief in an appellee case, and the issuance of an appellate opinion requiring a response, can, and frequently do, converge to render several projects due within a very short time of one another.

(2) Briefing requires that a block of time be set aside for work only on that project. One cannot work a day or two on some aspect of a brief, attend to some other project, and efficiently return to the brief a day (or a week) later.

(3) In a practice of any significant size, clients will regularly present the attorney with emergency appeals or other orders (such as a judgment) requiring briefing on short deadlines and/or (in defense practices) arrangements for surety bonds and stays of proceedings.

The economics of the practice require that the attorney maintain a caseload of sufficient size to pay overhead and provide a reasonable living for all concerned. In solo and free-standing

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[1]Although I am certain that criminal and family law practitioners have similar concerns, I do not presume to speak for them due to my lack of familiarity with the unique aspects of practice in those areas.

firms (such as mine), it is imperative to have billable appellate work constantly available.

The only safety valve which makes it possible to manage a profitable caseload is the availability of extensions of time. To be sure, they are not necessary in every case. I have filed seven to ten-page appellant briefs which took only two days to prepare. I have also filed 75 to 100-page briefs which took two to three months exclusively devoted to them. And I have filed briefs of 30-50 pages requiring two to four weeks depending upon the degree of complexity.

All briefs must be top quality to maintain credibility with the Court and the loyalty of the clients. Quality briefs take time. Managing a profitable caseload requires a mechanism which provides some predictable play in deadlines which is not dependent on the whims of the Court's discretion.

The fact that stipulations are used in only half of the cases implies that they are both necessary and are not being abused. However, reducing the time for filing an appellant's brief by two weeks will certainly increase the necessity for stipulations.

There are precious few appellate judges who have had substantial experience working as an attorney in a volume appellate practice. Those who have such experience will appreciate how critical it is to have stipulations available as a predictable device for caseload management. I hope that the rest will not take offense, but rather will take this letter as a sincere effort to convey the realities of appellate practice and the extremely deleterious potential of the proposal before this Court.

In sum, the proposed changes both reduce the time for filing an appellant's brief by 54%[2] **and** eliminates the safety valve necessary to maintain a profitable appellate caseload. Moreover, it admittedly does so with no assurance that the change will eliminate **one day's** delay in the foreseeable future. At such time as there is a point to doing so, a more moderate and informed adjustment in the briefing guidelines may be worthy of consideration. For now, I ask this Court to decline to adopt the proposed amendment of MCR 7.212.

Yours truly,

James G. Gross

JGG/kj

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[2]The current rule provides 56 days. An additional 56 days are available by stipulation (28 days) and by motion (additional 28 days) which is routinely granted.